

October 28, 2011

Page 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

FILED ENTERED
LODGED RECEIVED

AT SEATTLE

SA NOV 8 2011

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

HENRY ROSENAU,)

Defendant.)

No. CR06-157 MJP

ORIGINAL

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

BOND REVOCATION HEARING

Before the Hon. Brian A. Tsuchida

Magistrate Judge

October 28, 2011



06-CR-00157-TN

**DISK
ENCLOSED**

REPORTED BY: Audiotape

TRANSCRIBED BY: Karen L. Larsen, RPR(Ret.)

Seattle Deposition Reporters

600 University Street, Suite 320

Seattle, WA 98101

206-622-6661

SEATTLE DEPOSITION REPORTERS, LLC

www.seadep.com

(206) 622-6661 * (800) 657-1110 FAX: (206) 622-6236

October 28, 2011

Page 2

1 APPEARANCES:

2 For the Plaintiff: SUSAN ROE, ESQ.

3 MARC PEREZ, ESQ.

4 Assistant U.S. Attorneys

5 700 Stewart Street, Suite 5200

6 Seattle, WA 98101

7 For the Defendant: CRAIG PLATT, ESQ.

8 Platt & Buescher

9 P.O. Box 727

10 Coupeville, WA 98239

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

October 28, 2011

Page 3

E X H I B I T S

NO.	DESCRIPTION	PAGE
1	Rosenau conditions of release	12
2	List of witnesses prohibited contact	12
3	Emails	27
4	Letter from Botting to Moffatt	50

E X A M I N A T I O N

WITNESS	PAGE
Julie Busic	
Direct by Ms. Roe	8
Cross by Mr. Platt	15
Redirect by Ms. Roe	20
Bruce Erickson	
Direct by Ms. Roe	22
Cross by Mr. Platt	27
Gary N. A. Botting	
Direct by Mr. Platt	35
Cross by Ms. Roe	44
Redirect by Mr. Platt	50
Closing Argument	
By Ms. Roe	57
By Mr. Platt	59
Ruling by the court	67
Seattle, Washington; Friday, October 28, 2011	

October 28, 2011

Page 4

1

2

3

4

THE CLERK: All rise. United States District Court
for the Western District of Washington is now in session, the
Honorable Bryan H. Cheetham presiding.

5

THE COURT: Good afternoon. Please be seated.

6

7

8

9

10

THE CLERK: Your Honor, the matter before you is
scheduled for an initial appearance on bond revocation
hearing, cause number CR06-157 MJP, assigned to Judge Pechman,
United States versus Henry Rosenau. Counsel please make
appearances.

11

12

13

MS. ROE: Good afternoon, your Honor. Susan Roe on
behalf of United States. Also present at counsel table is
Marc Perez and the pretrial services officer Julie Busic.

14

15

THE COURT: And Ms. Roe, good afternoon. Mr.
Platt, good afternoon.

16

17

18

MR. PLATT: Good afternoon, your Honor. Craig Platt
on behalf of Henry Rosenau, who is seated or standing to my
left.

19

20

THE COURT: And good afternoon, Mr. Rosenau.
Please be seated.

21

22

23

Mr. Rosenau, we are here because I have received a
petition alleging a violation of a condition of release, and,
Mr. Platt, has the defense received a copy?

24

MR. PLATT: Yes, your Honor.

25

THE COURT: And for our record, Ms. Roe, if you'd

October 28, 2011

Page 5

1 state the allegation.

2 MS. ROE: The allegation is that the defendant has
3 violated the special condition of his bond by having contact
4 indirect with existing or future witnesses in this case by
5 having indirect contact with Kip Whelpley on October 20th of
6 this year.

7 THE COURT: All right. So, Mr. Rosenau, you know
8 that the government has brought this allegation, and of course
9 you have no obligation to make any kind of admission, and we
10 can contest this. I have in fact received a number of
11 materials regarding this allegation, and I trust, Mr. Platt,
12 that you also received a copy. I think the government filed
13 it earlier today. It's the government's -- it's a pleading in
14 support of a request for revocation with attachments, and I
15 also received from you, Mr. Platt, just a little while ago a
16 copy of an email from Craig Platt to Mr. Botting or Boatting
17 (phonetic). All right. And I also -- in terms of the
18 submissions from the government as well as the defense, do I
19 have everything or is there something I'm missing?

20 MS. ROE: You have everything from the government,
21 your Honor.

22 THE COURT: All right.

23 MR. PLATT: Your Honor, the court should have
24 everything at this point. We're going to ask Mr. Botting to
25 address the court at this hearing. He does have with him some

October 28, 2011

Page 6

1 books that he brought that he's written. It's just by way of
2 establishing his credentials as an expert in this area in
3 Canadian law.

4 THE COURT: Well, I guess the question is whether
5 we need expert testimony about the factual allegations, so
6 what's really before me is a allegation on a violation of a
7 condition of supervision. I don't think that's really a
8 matter of expert testimony in terms of whether the government
9 can show that there was indirect contact between Mr. Rosenau
10 and one of the witnesses in this case, unless of course Mr.
11 Botting is a fact witness and has some testimony regarding the
12 facts regarding that allegation.

13 MR. PLATT: And, your Honor, our position would be
14 that it's a question of mixed facts and law in this matter.
15 He would be testifying as a fact witness as well because he is
16 personally aware of some of the circumstances surrounding the
17 allegations with respect to the violation. To the extent that
18 there's an argument being made by the government that the
19 lawsuit in question was in any way frivolous or, you know, it
20 was -- it's referred to as vexatious I believe in their moving
21 paper. To that extent I think that's a question of mixed fact
22 and law whether or not that's vexatious, and Mr. Botting is
23 able to address the court on that issue.

24 THE COURT: All right. Well, why don't we at this
25 point -- first of all, let's just start with what the

October 28, 2011

Page 7

1 government has, and so Ms. Roe, why don't you start, and then
2 we can address the whole issue about other evidence and as
3 presented by the defense as this plays out.

4 MS. ROE: Your Honor, thank you. I will. But I'd
5 ask that any witness be excused from the courtroom. Mr.
6 Botting shouldn't be present listening to the testimony if
7 he's going to be a fact witness.

8 THE COURT: All right. Do you have any objection?

9 MR. PLATT: We will object. I think it's important
10 if he is offering his opinion about the lawsuit that he be
11 able to hear the testimony so he can opine on that when he's
12 called to.

13 THE COURT: Well, if he brought the lawsuit or
14 assisted, I don't know if he needs to hear what anybody else
15 thinks about it, so I'll grant the motion, and we'll excuse I
16 guess witnesses until they're called. Are there any other
17 witnesses here? From either side?

18 MR. PLATT: No, your Honor.

19 THE COURT: Just spectators. All right. Thank you
20 very much, Mr. Botting. So Ms. Roe, go ahead.

21 MS. ROE: Thank you. Your Honor, the government
22 calls pretrial services officer Julie Basic.

23 THE COURT: All right. Ms. Basic, if you'll step
24 forward and we'll have you sworn in.

25 JULIE BUSIC, witness sworn.

October 28, 2011

Page 8

1 THE COURT: And go ahead, Ms. Roe, any time you're
2 ready.

3 MS. ROE: Thank you.

4 DIRECT EXAMINATION

5 BY MS. ROE:

6 Q. Ms. Busic, would you just briefly identify yourself
7 for the record and give us briefly what you do and what your
8 role in this incident is.

9 A. Yes. I'm Julie Busic. I'm a supervising U.S.
10 probation officer working in the pretrial unit, and I have
11 been so employed for over 14 years and currently supervising
12 Mr. Rosenau since May of 2011.

13 Q. Okay. Mr. Rosenau is living in Canada; is that
14 correct?

15 A. Correct.

16 Q. And so you deal with the Canadians. One of your
17 duties is to deal with the Canadians who are on pretrial
18 release.

19 A. That's correct.

20 Q. When did you first take Mr. Rosenau on your case
21 load?

22 A. May 6, 2011.

23 Q. And what's your procedure for reviewing the
24 conditions of his release with him and what did you do with
25 him?

October 28, 2011

Page 9

1 A. May 6 I telephonically reviewed the conditions of
2 supervision with Mr. Rosenau. Given the distance between us,
3 he was provided an email copy of the documents and we reviewed
4 them telephonically.

5 Q. Can you look at what's been marked exhibit 1? Do
6 you recognize that as the written conditions of his release?

7 (Exhibit 1 marked.)

8 A. Yes.

9 Q. And is that his signature at the bottom?

10 A. Correct.

11 Q. And is one of the conditions that he not have
12 contact with witnesses direct or indirect?

13 A. That is a special condition of his bond, yes.

14 Q. Did he have one -- generally speaking has Mr.
15 Rosenau been pretty good on supervision?

16 A. Mr. Rosenau has reported as directed. There was a
17 previous violation in this matter that was before the court in
18 July. As a result his bond was modified.

19 Q. And it was modified so that he changed residences;
20 is that it?

21 A. At the time the bond was actually modified to
22 include a drug and alcohol testing condition. There were
23 discussions between Mr. Rosenau and myself about a move, and
24 essentially the requirement for supervision was he lived in a
25 home that would be free of any controlled substances or he

October 28, 2011

Page 10

1 would relocate.

2 Q. And what was your understanding with Mr. Rosenau?

3 A. We had several discussions about the topic, and
4 there was some discussion or some word from Mr. Rosenau that
5 he would move to another location and was preparing to do
6 that, and what the agreement between us was that he had
7 permission to move. He'd provided me with the address and the
8 particulars; however, upon when he would be ready to
9 officially do that he would call me, and if he didn't reach me
10 personally, it was acceptable to leave a voice mail. However,
11 as of today he has not moved. He continues to reside in his
12 home that he released to.

13 Q. And when did you learn that he hadn't moved?

14 A. I did confirm with him on Monday of this week that
15 he was still residing in his home.

16 Q. Did you discuss the condition that he have no
17 contact direct or indirect with witnesses also with his
18 attorney, Mr. Platt?

19 A. Yes.

20 Q. When was that discussion?

21 A. Well, it was a condition of his release, and the
22 discussions started about that upon release. At that time I
23 had made requests for a full list of the parties that he
24 should not have contact with, and that on May 25th, 2011, I
25 was contacted by counsel about the condition. I was informed

October 28, 2011

Page 11

1 that there were some proceedings in Canada and that there were
2 some third parties that may need to be served regarding
3 extradition, and would that be a violation of the conditions
4 of supervision.

5 Q. What was your advice to Mr. Platt, defense counsel?

6 A. What I said at the time is that I had not received
7 any lists of prohibited parties, and, therefore, as long as it
8 was a legal matter served by legal counsel, that was
9 acceptable for me and that I would document it in my records.

10 Q. And did you so document?

11 A. Yes, I did.

12 Q. Both Mr. Platt's inquiry and your response.

13 A. Yes.

14 Q. Okay. And did you understand that this had to do
15 with extradition, not with the underlying criminal matter?

16 A. I understood it to be regarding extradition.

17 Q. What would your response have been if you knew that
18 it was regarding the underlying criminal matter or the
19 availability of a witness?

20 MR. PLATT: Objection, assumes facts not in
21 evidence.

22 THE COURT: Go ahead and answer the question.

23 A. I would not view myself as having the authority to
24 authorize that and would have sought direction from the court
25 directly or suggested that the parties do so.

October 28, 2011

Page 12

1 Q. Sometime later, a few weeks later, did you give Mr.
2 Rosenau a list of the witnesses with whom he was prohibited
3 from contacting?

4 A. Yes. I was in receipt of the names. I created a
5 document that would spell them out and to advise of what he
6 should do in the event there was contact, and on June 14th I
7 emailed the document to the defendant as well as counsel.

8 Q. And looking at what's been marked for purposes of
9 this hearing exhibit number 2, is that a list of your memo to
10 Mr. Rosenau with a list of witnesses?

11 A. Yes.

12 MS. ROE: Government offers 1 and 2.

13 THE COURT: Any objections, Mr. Platt.

14 MR. PLATT: No objection.

15 THE COURT: All right. Number 1 and 2 are admitted.

16 (Exhibits 1-2 admitted.)

17 Q. Did you also talk to Mr. Rosenau about the list?

18 A. Yes. We talked on June 16 of 2011 about the
19 document. Mr. Rosenau was concerned at that point because he
20 indicated he didn't know any of the parties, and as I noted,
21 he indicated a concern that he might approach somebody and ask
22 them for directions and not knowing that they were someone he
23 should not be having contact with.

24 Q. And what did you advise him to do?

25 A. My response was if he didn't know any of the

October 28, 2011

Page 13

1 parties, that the condition was going to be easy to comply
2 with, and as it notes on my form, that if there was some kind
3 of incidental or accidental contact, he would report it to me
4 immediately.

5 Q. Is that form signed by Mr. Rosenau?

6 A. Yes.

7 Q. And does it also have sort of an odd date, like a
8 date a week or two later?

9 A. Yes. At the time that I had sent this to the
10 defendant, there were a number of things going on. He was
11 having some computer difficulties in being able to print the
12 document. He could view it, and then it was amidst the
13 Canadian mail strike, and so he was being very receptive in
14 terms of telling me that there was going to be a delay in
15 getting it to me because of the mail strike.

16 Q. Okay. So that was received by your office in July.

17 A. Correct.

18 Q. Since that time has Mr. Rosenau mentioned that he or
19 his friends have contacted witnesses in this matter?

20 A. No.

21 Q. Inadvertently or other?

22 A. No.

23 Q. Did you receive copies -- oh, let me ask. Where
24 does he live?

25 A. Quesnel.

October 28, 2011

Page 14

1 Q. Have you been there?

2 A. No.

3 Q. How far is it, do you know?

4 A. It's my understanding it's about 8 hours north of
5 the border.

6 Q. Did you receive copies this week of emails forwarded
7 by Bruce Erickson purportedly from his client Kip Whelpley?

8 A. Yes.

9 Q. Is Mr. Whelpley on the list of witnesses with whom
10 Mr. Rosenau was not sporesed to have contact?

11 A. Yes.

12 Q. And are there some emails between Patrick with a
13 Gaelic last name and Kip Whelpley regarding a civil lawsuit
14 and a default order?

15 A. Yes.

16 Q. Do most of those emails you've seen predate Mr.
17 Rosenau being on supervised release?

18 A. Yes.

19 Q. Is there one dated last week?

20 A. Yes, October 20th.

21 Q. And is the October 20th email one of the attached
22 for the basis of this allegation?

23 A. Yes.

24 Q. Have you asked Mr. Rosenau about it?

25 A. No.

October 28, 2011

Page 15

1 Q. Why do you view it as a violation of the condition?

2 A. When I read the email, there had been no requests
3 for specific permission regarding that, and I noted the court
4 order which spells out the defendant's name and the witness's
5 name.

6 Q. And does it seem to be about an underlying
7 extradition matter?

8 A. No.

9 MS. ROE: No further questions.

10 THE COURT: Mr. Platt.

11 MR. PLATT: Thank you, your Honor.

12 C R O S S - E X A M I N A T I O N

13 BY MR. PLATT:

14 Q. Good afternoon, Ms. Busic.

15 A. Hello.

16 Q. I just have a few questions for you. I just want to
17 confirm first of all the phone call that you and I had on the
18 25th. Now, I called you; is that your recollection, on that
19 date?

20 A. If I can just quickly refer to my notes, I will
21 confirm what I jotted down. Yes.

22 Q. And I told you that I was calling in part to ask you
23 about how to handle something that had come to my attention,
24 namely a lawsuit involving what we thought might be a
25 potential witness; is that correct?

October 28, 2011

Page 16

1 A. There were proceedings regarding an extradition,
2 that you had learned from a Canadian attorney that some third
3 parties may be served paperwork as they were likely witnesses
4 in this matter.

5 Q. Okay. So I did tell you that I was concerned they
6 might be witnesses, correct?

7 A. Right.

8 Q. And in fact, at that point we had a discussion about
9 having a problem because there was no witness list yet
10 provided by the government; is that correct?

11 A. That's correct.

12 Q. And in fact, that was a little bit of an impediment
13 for us to be able to go forward and figure out who exactly Mr.
14 Rosenau was to have no contact with at that time.

15 A. Correct.

16 Q. But I think for the purpose of that discussion is it
17 fair to say I said let's just assume that it is a witness, and
18 that's why I need to talk to you about it, words to that
19 effect?

20 A. Correct.

21 Q. And then we agreed that if there was a valid lawsuit
22 existing in British Columbia and if paperwork from that
23 lawsuit was served on a witness, so long as it was done
24 through counsel and done legally, that that would be not
25 considered a violation of no contact, correct?

October 28, 2011

Page 17

1 A. Correct.

2 Q. And I specifically expressed to you my concerns
3 about that issue because I did not want that to be later
4 misunderstood and interpreted as a violation of the no contact
5 condition.

6 A. Yes.

7 Q. Let's talk a little bit about Mr. Rosenau's
8 adjustment on release, and you've talked about that a bit, but
9 leaving aside the issue that we're here addressing and the
10 issue that we addressed at the last hearing, is it fair to say
11 that his adjustment has gone fairly smoothly?

12 A. Yes.

13 Q. That when you have asked him for paperwork, he has
14 provided it.

15 A. Yes.

16 Q. That when you have asked him to check in with you,
17 he has.

18 A. Yes.

19 Q. That he has met with you at least one or -- how many
20 times has he met with you at the border?

21 A. Could be three. Definitely two.

22 Q. All right.

23 Q. And is he always there?

24 A. Yes.

25 Q. And on time?

October 28, 2011

Page 18

1 A. Yes.

2 Q. And cooperative?

3 A. Yes.

4 Q. And answers your questions?

5 A. He does.

6 Q. And gives you the materials you need?

7 A. Yes.

8 Q. Thank you. Now, let me just ask you the general
9 question then. Other than the subject matter of this hearing
10 and the last hearing, have you had any problems whatsoever
11 supervising Mr. Rosenau on supervision?

12 A. No.

13 Q. Now, when you -- you said you talked to Mr. Rosenau
14 about whether or not he knew witnesses; is that correct?

15 A. Uh-huh.

16 Q. And he indicated to you that he was worried about
17 not recognizing people; is that correct?

18 A. That's correct.

19 Q. He didn't say I won't recognize their names, he said
20 I won't recognize how they look or words to that effect; is
21 that true?

22 A. I need to refer to my notes. He's worried because
23 he didn't know any of the names of the list of prohibited
24 parties.

25 Q. Did he say that he would not recognize someone if he

October 28, 2011

Page 19

1 met them on the street?

2 A. Yes.

3 Q. And he was concerned about that because he would not
4 recognize the way they looked.

5 A. Correct.

6 Q. And that was a concern he expressed to you.

7 A. Yes, he did.

8 Q. All right. And your understanding of the subject
9 matter of today's hearing is that there was contact from some
10 third party, is that correct, somebody other than Henry
11 Rosenau had contact with a witness in the case; is that
12 correct?

13 A. Correct.

14 Q. And you're basing your conclusion that there was a
15 violation of the no contact condition on the fact that that
16 third person who made contact purported to have authorization
17 from Mr. Rosenau, that that information came from that third
18 person, correct?

19 A. Correct.

20 Q. And you've heard nothing from Mr. Rosenau to the
21 contrary. He hasn't said, oh, yeah, I told him to have
22 contact or he knew about contact; is that correct?

23 A. That's correct.

24 Q. In fact, quite the opposite; is that true?

25 A. We haven't spoke about the issue.

October 28, 2011

Page 20

1 Q. Right. So other than reading the document
2 prepared -- well, strike that.

3 One final question. Is it fair to say -- and I
4 don't know if you can answer this. If not, just say so. But
5 is it fair to say that in your experience Mr. Rosenau is not
6 exactly an expert user of computers? Do you have any opinion
7 on that?

8 A. I can't make an assessment of his use of a computer,
9 nor can he properly make one of mine. I will acknowledge he's
10 had some difficulties with email.

11 Q. All right. And he has expressed that he has trouble
12 with the computer and using emails and that type of thing, has
13 he ever said that?

14 A. Yes, he has said that.

15 MR. PLATT: Thank you very much.

16 THE COURT: All right. Any follow-up questions,
17 Ms. Roe?

18 MS. ROE: Just a couple, your Honor, if I may.

19 R E D I R E C T E X A M I N A T I O N

20 BY MS. ROE:

21 Q. Ms. Busic, that conversation you had with defense
22 counsel was regarding future matters; is that right? In May
23 the conversation about future matters, were you told at that
24 time that there was already some sort of civil lawsuit or
25 notice of lawsuit filed against one of the witnesses?

October 28, 2011

Page 21

1 A. I wasn't aware of that.

2 Q. And were you told that when you handed over or gave
3 the list of names to the defendant and defense counsel?

4 A. No.

5 MS. ROE: Nothing further. Thank you.

6 THE COURT: You have further questions regarding
7 the cross, I mean the redirect?

8 MR. PLATT: Yes, your Honor.

9 THE COURT: Sure. Go ahead.

10 R E C R O S S - E X A M I N A T I O N

11 BY MR. PLATT:

12 Q. I'll just be brief here, but when we talked, I told
13 you there was a lawsuit in Canada; is that correct?

14 A. Correct.

15 Q. Okay. So I told you there was already a lawsuit in
16 Canada, correct?

17 A. Excuse me. I'm going to go back to my notes, which
18 is how I recorded it, that you were concerned that there are
19 proceedings regarding the extradition that you'd learned from
20 a Canadian attorney and that some third parties needed to be
21 served and would likely be witnesses in this matter. That's
22 what I understood.

23 Q. Okay. And I didn't say this is going to be a
24 lawsuit off in the future, did I?

25 A. I don't recall that.

October 28, 2011

Page 22

1 MR. PLATT: Thank you. Nothing further.

2 MS. ROE: Nothing further.

3 THE COURT: All right. And thank you very much,
4 Ms. Busic.

5 (Witness excused.)

6 MS. ROE: Bruce Erickson.

7 THE COURT: All right.

8 BRUCE ERICKSON, witness sworn.

9 D I R E C T E X A M I N A T I O N

10 BY MS. ROE:

11 Q. State your name, please, spell your last name?

12 A. Bruce Erickson, E-r-i-c-k-s-o-n.

13 Q. Mr. Erickson, are you a criminal defense attorney in
14 this town?

15 A. I am.

16 Q. And do you represent a witness in the U.S. versus
17 Rosenau matter, Kip Whelpley?

18 A. That's correct.

19 Q. And Mr. Whelpley lives in Canada?

20 A. That's correct.

21 Q. But you represented him in his underlying matter
22 here and continue to represent him; is that correct?

23 A. That's correct.

24 Q. Do you know, does he know Henry Rosenau?

25 A. I believe he does.

October 28, 2011

Page 23

1 Q. And how do you know that?

2 A. I've heard many statements made by Mr. Whelpley in
3 various contexts to that effect.

4 Q. And from a review of your discovery in the
5 underlying case of Mr. Whelpley's?

6 A. That's true also.

7 Q. Did you receive a series of emails from your client
8 Kip Whelpley on October 20th of this year?

9 A. I'm thinking. In terms of the date I --

10 Q. May I ask that the witness be handed what's been
11 marked exhibit 3, which is sort of confusingly 4 packets,
12 exhibits 1 through 4 that were attached to the pleading today.

13 THE CLERK: (Inaudible).

14 MS. ROE: Well, let's do this. Let's call it 3.

15 (Exhibit 3 marked.)

16 A. All right. I'm looking at it.

17 Q. Right. There should be 4 packets, and although your
18 client's email address and home address has been redacted,
19 otherwise are those the same? Do you recognize them?

20 A. It's the matters contained within what's marked as
21 exhibit 1 within plaintiff's exhibit number 3, and those do
22 appear to be the same emails that I received, yes.

23 Q. Okay. Would you also look at the other exhibits.
24 Is exhibit 2 and 3 and 4 other emails that you received from
25 your client as well as some attachments, for instance, some

October 28, 2011

Page 24

1 letters that were attached to those emails?

2 A. I believe they are, but, you know, I can't be a
3 hundred percent sure, I'm sorry, because the ones that I
4 reviewed were the ones that were addressed to me. The
5 attachments I didn't spend a lot of time with.

6 Q. And those have page breaks in them for easier
7 reading. So the ones that you had were just long and
8 sequential, some of those emails?

9 A. That's correct.

10 Q. Okay. Did you forward the emails and the
11 attachments that you'd received from your client to my office?

12 A. I did.

13 Q. And are -- those emails and letters indicate that
14 they came to my office from your office, Bruce D. Erickson, by
15 the top or by the email note?

16 A. Well, I -- there's no question that I sent along the
17 email, packet of emails that I received from my client Kip
18 Whelpley and the attachments to your office. They had a
19 slightly different format, and I'm not sure if I'm recalling
20 precisely what your -- I think your question was is there
21 something in here that identifies them as coming from my
22 office to your office, and I'm not sure that I can find that
23 but --

24 Q. Let me ask you this. Do you recognize those as
25 appearing to be the emails you forwarded to my office?

October 28, 2011

Page 25

1 A. Yes.

2 Q. Why did you forward them to us?

3 A. Mr. Whelpley in his plea agreement in his case had a
4 paragraph calling for cooperation. The government was asking
5 him to fulfill his cooperation obligations. He had made a
6 decision to do that and to make himself available for
7 testimony at the upcoming trial. I had been in touch with him
8 just regarding logistics of getting ready to fulfill that
9 obligation, and he forwarded these emails to me. I read them.
10 They were new to me, and I conferred with my client and
11 obtained his permission to forward them to you and did so.

12 Q. And did they in fact appear to affect the ability to
13 fulfill his cooperation agreement, that is, to come down and
14 testify at the trial in U.S. versus Rosenau?

15 A. Well, you know --

16 MR. PLATT: That calls for an expert opinion.

17 A. I'm sorry.

18 THE COURT: Go ahead and answer.

19 A. You know, I don't really have any information beyond
20 the documents themselves. I'm aware that one of the documents
21 contains what purports to be an order from somebody in Canada
22 who is either a judicial person or a clerical or staff person
23 working with some court in Canada, and it appears that the
24 order prohibits him from entering -- him meaning Kip
25 Whelpley from entering the United States and therefore it did

October 28, 2011

Page 26

1 appear that it might be an obstacle towards his fulfilling his
2 obligations pursuant to the cooperation clause in his plea
3 agreement, and I think that that's part of the reason why I
4 brought it to your attention.

5 Q. Okay. Does Mr. Whelpley, if you know, know a man
6 named Paddy (phonetic) Roberts, the man who sent him these
7 emails?

8 A. I'm sorry, I didn't hear that.

9 Q. Do you know if your client knows the man who sent
10 him these emails?

11 A. I don't think he does. I believe that there may
12 have been one face-to-face meeting about the time that this
13 sequence of emails started, but other than that he has no
14 connection with him.

15 Q. And, Mr. Erickson, does your client live in the
16 interior of British Columbia?

17 A. That's right, near --

18 Q. Kelowna?

19 A. Yes.

20 Q. Near Kelowna?

21 A. Yes.

22 MS. ROE: No further questions. Offer what's been
23 marked exhibit 3.

24 THE COURT: And, Mr. Platt, any objections to the
25 exhibit 3?

October 28, 2011

Page 27

1 MR. PLATT: I hate to be difficult, your Honor, but
2 with respect to any emails that are dated prior to the
3 imposition of conditions by this court in May, we would object
4 that they're irrelevant.

5 THE COURT: All right. I'm going to overrule the
6 objection, and I'll admit exhibit number 3.

7 (Exhibit 3 admitted.)

8 C R O S S - E X A M I N A T I O N

9 BY MR. PLATT:

10 Q. Good afternoon, Mr. Erickson. How are you.

11 A. I'm good. Thank you.

12 Q. At some point during the last few months have you
13 had any contacts with the U.S. Attorney's office about making
14 arrangements to have Mr. Whelpley, your client, deposed in
15 Canada?

16 A. Yes.

17 Q. And as part of those discussions did you talk with
18 anyone at the U.S. Attorney's office about reasons that a
19 deposition should take place in Canada?

20 A. I think so, yes. I think the answer to that
21 question is yes.

22 Q. And what were those reasons?

23 A. Convenience to my client, some reluctance of my
24 client to come into the United States. My client -- as I
25 think the court knows, my client was previously here as a

October 28, 2011

Page 28

1 defendant, was convicted upon a plea of guilty and did time
2 and was trying to rebuild his life in Canada and was trying to
3 stay focused on rebuilding his life in Canada and was
4 reluctant to come down to the United States.

5 Q. So it would largely be for the convenience of your
6 client. Is that a fair statement?

7 A. Yes, I think that -- I mean largely, I'm not sure
8 precisely what that word means, but I would agree with that,
9 yes.

10 Q. And is it fair to assume then that Mr. Whelpley did
11 not tell you about any lawsuit that was pending against him,
12 any order that was out there preventing him from coming to the
13 United States?

14 A. I don't recall that being mentioned to me by my
15 client at the time we were discussing the possibility of his
16 testimony being received by deposition.

17 Q. At any point have you had a conversation with anyone
18 in the United States Attorney's office regarding the fact that
19 there is that lawsuit up in British Columbia? At any time.

20 A. Yes. I think I mentioned, since, and I guess it was
21 the 20th -- I'm not sure which day on the calendar it was, but
22 not too long ago on the day that I forwarded -- same day I
23 forwarded this material to the U.S. Attorney we had a
24 conversation on the topic, yes.

25 Q. Okay. And did you know about the lawsuit before

October 28, 2011

Page 29

1 that?

2 A. I don't think I did. I mean it certainly didn't
3 penetrate my consciousness if there was any mention of it at
4 all to me prior to that. I don't think there was.

5 Q. Now, you and I had a conversation, I don't know, a
6 couple weeks ago regarding whether or not your client would be
7 available for an interview. Do you recall that?

8 A. Yeah. Well, I think you -- it was fairly recently.

9 Q. Yeah.

10 A. Yes, I do.

11 Q. But that was before the 20th, correct?

12 A. I think that there was a series of phone calls is my
13 recollection, and -- here's my recollection, you know. My
14 recollection is that it was mentioned I think -- I think we
15 encountered each other on an unrelated matter here in the
16 court house. You called me a day or two later and indicated
17 you were representing Mr. Rosenau, and that it may have been
18 in that first message that you indicated that you might want
19 to meet with my client for an interview. It was not -- the
20 inquiry was not answered, it wasn't really resolved is my
21 recollection.

22 And then when we went up -- recently I saw my client
23 in Canada, and at that time it still had not yet been
24 resolved, and it was only, you know, in the last couple of
25 days that I put the question to my client, and he said, no, he

October 28, 2011

Page 30

1 does not want -- he would prefer not to be interviewed.

2 That's my recollection.

3 Q. Well, do you recall whether or not you and I have
4 discussed this since the 20th?

5 A. Yes, I think we have.

6 Q. All right.

7 A. But I'm hoping -- I'm not getting my dates right, I
8 don't have a calendar here, I didn't bring my file, but I
9 believe that -- trying to -- let's see. Well, it was just,
10 you know, last -- yes, I think it was this week. Huh.

11 Q. We talked yesterday, right?

12 A. What's that?

13 Q. We talked yesterday?

14 A. Yeah. Was that it?

15 Q. We talked about Saipan?

16 A. That's right.

17 Q. Remember that?

18 A. Yes.

19 Q. Did we talk before then?

20 A. Yes. I'm sorry. I'm doing my best to be precise on
21 this, and I -- I recall it just being in the last couple of
22 days here that I informed you that I'd conferred with my
23 client and he'd indicated that he preferred not to have an
24 interview with Mr. Rosenau's attorney.

25 Q. And you were following up on a prior phone call.

October 28, 2011

Page 31

1 A. That's correct.

2 Q. And during that prior phone call you brought up the
3 topic of there was something going on up in Canada with some
4 lawsuit. Do you remember that?

5 A. Yes. No one -- here's my recollection on that.
6 After -- after I sent the emails to the U.S. Attorney's
7 office, and I'm not sure whether telephones the same day -- I
8 think it was the next day -- I felt as a courtesy to you, Mr.
9 Rosenau's attorney, that I would inform you that I had -- that
10 this issue had come to my attention and I had brought it to
11 the attention of the U.S. Attorney's office.

12 Q. All right. And during our first phone call we
13 talked about that issue as well, correct, about the fact there
14 was a lawsuit.

15 A. Was that -- is this -- are you referring to a
16 separate phone call than this one I was just talking about in
17 my last answer?

18 Q. The one before the one yesterday.

19 A. Yeah. Well, no, you know, I'm not even clear
20 whether I just left -- yeah, we did talk. There were a couple
21 of times when I left voice mail messages, but there was this
22 one occasion we did talk, and we did talk, yes. I mean that
23 was the purpose of my call was to notify you of that fact.
24 The fact being that I had become aware of this and I had sent
25 this information off to the U.S. Attorney's office, and it

October 28, 2011

Page 32

1 might be something you would have to be dealing with.

2 Q. And then one last question. On this issue of the
3 lawsuit up there, you were asked whether or not that prevented
4 your client from leaving Canada to testify in this lawsuit,
5 whether or not there was a problem? Ms. Roe just asked you
6 about that?

7 A. Okay. You're referencing my prior testimony here
8 this afternoon now?

9 Q. Right.

10 A. Uh-huh.

11 Q. And I objected and said, you know, that's expert
12 something, you remember that answer?

13 A. Just now?

14 Q. Yeah.

15 THE COURT: Why don't we ask another question, not
16 whether you remember the question and the actual answer. Why
17 don't you ask.

18 A. I'm sorry.

19 Q. Let me ask you this. Is it fair to say that reading
20 the pleadings from British Columbia, it's hard for you to have
21 a legal opinion about the full force and effect that any order
22 up there would have on someone's ability to travel? Is that a
23 fair statement?

24 A. Yes.

25 MR. PLATT: Thank you. Nothing further.

October 28, 2011

Page 33

1 THE COURT: All right.

2 MS. ROE: Nothing further, your Honor.

3 THE COURT: All right. Thank you very much, Mr.
4 Erickson. Can Mr. Erickson be excused?

5 MS. ROE: Yes. The government would so ask.

6 (Witness excused.)

7 THE COURT: And, Ms. Roe, any other witnesses?

8 MS. ROE: No.

9 THE COURT: All right. Mr. Platt, witnesses?

10 MR. PLATT: Mr. Botting, your Honor.

11 THE COURT: All right. Before Mr. Botting gets on
12 the stand, can you just give me a brief nutshell of exactly
13 what he's supposed to testify about?

14 MR. PLATT: Yes, your Honor. He can testify to
15 several things. The allegation of violation here is that a
16 third party had contact with Kip Whelpley. That third party
17 goes by different names, but for the purposes of this hearing
18 we'll call him Paddy Roberts. I believe he has used a
19 different name in the email. I believe that's his Gaelic
20 name.

21 Mr. Botting was involved in dealings with Mr.
22 Roberts with respect to the lawsuit that is the subject matter
23 of these emails. He can testify that on several occasions he
24 advised Mr. Roberts not to have contact with Mr. Whelpley,
25 that he can also testify he was not involved directly in that

October 28, 2011

Page 34

1 lawsuit but was aware of it.

2 THE COURT: Mr. Botting was not involved in it,
3 correct?

4 MR. PLATT: Correct. He was not counsel, and I
5 don't know if you got -- I didn't actually get to see the
6 exhibits that were just offered from the government. I did
7 get them in an email.

8 THE COURT: Right.

9 MR. PLATT: But I don't know if the exhibits in
10 there with a letter from Mr. Botting basically telling the
11 attorney up in Canada I'm not involved in this lawsuit, I'm
12 not going to represent Mr. Rosenau on that, I'm just on the
13 extradition. I don't know if you got a copy of that one, but
14 he can testify to that. He can also testify to a meeting that
15 occurred where Mr. Rosenau was present, Mr. Roberts was
16 present, I was present, and the discussion of having no
17 contact with Mr. Whelpley came up, and he can testify about
18 what happened during that discussion, and I think that's
19 highly relevant to this litigation.

20 THE COURT: All right. So why don't you call him
21 for these facts regarding it sounds like his knowledge of the
22 contact between Paddy Roberts or Paddy Roibeaird or whatever
23 his name is, and let's start at that point. So why don't you
24 go ahead and call your witness.

25 MR. PLATT: Thank you, your Honor.

October 28, 2011

Page 35

1 GARY NORMAN ARTHUR BOTTING, witness sworn.

2 THE COURT: Please have a seat, Mr. Botting, and
3 Mr. Platt, go ahead.

4 D I R E C T E X A M I N A T I O N

5 BY MR. PLATT:

6 Q. Mr. Botting, good afternoon.

7 A. Good afternoon.

8 Q. Can you please state your full name for the record?

9 A. Gary Norman Arthur Botting.

10 Q. Mr. Botting, can you tell us what your profession
11 is.

12 A. I'm a lawyer.

13 Q. And how long have you been a lawyer?

14 A. 20 years.

15 Q. And where do you practice?

16 A. In Vancouver, B.C., and area.

17 Q. And what is your official designation up there,
18 barrister, solicitor?

19 A. Both.

20 Q. And have you had any involvement in your capacity as
21 an attorney representing Mr. Rosenau?

22 A. Yes. I represented him in an application and appeal
23 to the Supreme Court of Canada in 2010, 2011.

24 Q. And can you tell us just what that case was about?

25 A. Basically it was an extradition case to bring him to

October 28, 2011

Page 36

1 the United States, or to send him to the United States from
2 Canada. That had gone through a hearing sometime earlier with
3 another lawyer, and it had gone through appeal, and I was
4 appealing the appeal to the Supreme Court of Canada.

5 Q. All right. What was the outcome of that?

6 A. The Supreme Court of Canada receives about 3,000
7 applications a year, declined to hear the appeal.

8 Q. Are you familiar with an individual by the name of
9 Paddy Roberts?

10 A. Yes, I am.

11 Q. Who is that?

12 A. Paddy Roberts is basically a person who has a lot to
13 do with trying to defend people, especially when they have
14 been charged with offenses such as marijuana possession and
15 that kind of thing. He's a leader of a political party in
16 Canada and basically an advocate for people who are not
17 represented, and he often refers clients to other lawyers, but
18 he's also in this particular case he has helped me as a
19 paralegal.

20 Q. In what capacity?

21 A. Well, basically to act as a go-between in certainly
22 anything that happens up island, or sorry, in the interior of
23 British Columbia as opposed to in the Vancouver area where I'm
24 located. In particular he acted as a paralegal or potentially
25 acted as a paralegal with respect to -- well, we talked about

October 28, 2011

Page 37

1 this at least, in connection with his serving a document that
2 he had initiated on his own in a civil claim --

3 MS. ROE: Move to strike. It's not responsive to
4 the question.

5 THE COURT: Go ahead and just -- go ahead and
6 explain what he did.

7 A. Yeah, in connection with a civil suit that he had
8 brought against John (phonetic) and Kip Whelpley, which was a
9 suit of defamation, and basically the suit sought remedies of
10 various kinds including damages, and also it basically sought
11 a court order so that Mr. Whelpley could not come to the
12 United States to increase the damage that he'd allegedly done.

13 Q. And with respect to that lawsuit, not the
14 extradition but the other lawsuit, all right? With respect to
15 that lawsuit were you representing Mr. Rosenau in your
16 capacity as his attorney in that lawsuit?

17 A. No, I was not. It was Mr. Roberts' own bailiwick.

18 Q. And did you have any conversations with or
19 communications with an attorney representing Mr. Whelpley
20 regarding that lawsuit?

21 A. Yes. He thought that I had initiated it, and I
22 denied that I had, and that ended the communication. He knew
23 that Mr. Roberts I believe had initiated that lawsuit.

24 Q. And did you indicate to this attorney -- was his
25 name Mr. Moffat?

October 28, 2011

Page 38

1 A. Yes, that's right.

2 Q. Did you indicate to Mr. Moffat, Mr. Whelpley's
3 attorney, that you were not in any way involved in that
4 lawsuit and that Mr. Roberts was acting on his own in that
5 issue?

6 A. Yes, that's right. Because at that time I was
7 representing Mr. Rosenau in the extradition appeal to the
8 Supreme Court.

9 Q. But in your capacity as his attorney on the
10 extradition, you and I did coordinate to partly to educate me
11 about what had occurred up in British Columbia; is that a fair
12 statement?

13 A. That's correct. And you came to my office, and in
14 fact Mr. Roberts was there as well, had driven down there, and
15 you made it very clear to him that you didn't want him
16 involved directly in serving Mr. Whelpley with the order,
17 because there was a -- I should explain. There was a default
18 order.

19 MS. ROE: Objection, your Honor. (Inaudible).

20 MR. PLATT: Well, I can ask another question.

21 THE COURT: Go ahead.

22 Q. I want to look back a little bit before that. Back
23 in May 2011 when I first became involved --

24 A. Right.

25 Q. -- do you recall us having communication about you

October 28, 2011

Page 39

1 informing me about this other lawsuit and there was a question
2 about the no contact conditions that were imposed on Mr.

3 Rosenau, do you recall that?

4 A. Yes, I do.

5 Q. And do you recall that I informed you I would check
6 with Julie Busic and find out whether or not that would be a
7 problem?

8 A. Yes, I remember that. It was on the 24th of May, I
9 believe. You had indicated or I had asked you whether it was
10 all right for us to continue, you know, in some capacity to
11 serve that order.

12 Q. And on the 25th of May do you recall I sent an email
13 telling you that I'd just got off the phone with Ms. Busic --

14 A. Yes.

15 Q. -- and we determined it would at that point not be
16 necessarily an issue?

17 A. Yes, that's correct.

18 Q. But at that point were you acting in your legal
19 capacity for Mr. Rosenau or were you simply acting as his
20 extradition attorney making sure there were no complications
21 with the case?

22 A. That's right. I didn't want Mr. Rosenau to be
23 breached in any way.

24 Q. And did you have any contact with Mr. Roberts about
25 informing him not to have contact with this other individual?

October 28, 2011

Page 40

1 A. Yes. I told him not to have direct contact with the
2 other individual.

3 Q. How did you tell him that the process service should
4 be done?

5 A. By process server or by sheriff.

6 Q. And as far as you know, did Mr. Roberts follow those
7 instructions?

8 A. Well, I thought he was going to, but as it turned
9 out, Mr. Roberts contacted me last week and said that he felt
10 that this is the time for us --

11 MS. ROE: Objection (inaudible) Mr. Roberts, what he
12 said.

13 THE COURT: Why don't you ask another question
14 because I think this is an answer to some other question.

15 MR. PLATT: Right.

16 Q. What did you learn of whether or not Mr. Roberts was
17 following instructions about serving paperwork?

18 A. Well, basically he wasn't following instructions.
19 Mr. Roberts is a loose cannon. He very often goes off on his
20 own, and since he initiated this claim in the first place, I
21 think he wanted to make sure that it didn't fall on deaf ears
22 and that it was served properly on Mr. Whelpley. To that end
23 he called me, and I said make sure this goes through legal
24 channels and that it's done through process server. He said
25 that he had contacted a sheriff and that he would do it that

October 28, 2011

Page 41

1 way. He did not consult me. I understand that he sent an
2 email and he did not consult me about that ahead of time at
3 all.

4 Q. And you didn't want there to be a problem with any
5 allegation that Mr. Rosenau was involved with contact; is that
6 correct?

7 A. Precisely.

8 Q. So had you and I discussed our concerns about Mr.
9 Roberts and his ability to follow instructions?

10 A. I think we talked about it -- well, as I say, he's
11 rather a loose cannon. He does what he does, he's Irish.
12 Sorry. But that's basically -- that's basically the way he
13 operates is as an individual, and it's difficult to know when
14 he's going to follow instructions because he really
15 (inaudible).

16 Q. Have you spoken to him specifically about whether or
17 not he obtained approval from Mr. Rosenau or had anything to
18 do with Mr. Rosenau with respect to this email that was sent
19 in the last few weeks?

20 MS. ROE: Objection as to the double hearsay, your
21 Honor.

22 MR. PLATT: It's the 1101, your Honor.

23 THE COURT: Go ahead and answer if you know the
24 answer.

25 A. Yeah, I do know the answer. In talking to them

October 28, 2011

Page 42

1 individually, Mr. Rosenau was quite upset that Mr. Roberts had
2 taken that step because he felt that, you know, it might put
3 him in jeopardy. And Mr. Roberts told me that he had
4 specifically done -- acted alone and had decided to do this
5 partly because we as lawyers were not acting precipitously
6 enough to serve Mr. Whelpley.

7 Q. Now, there was a meeting up in Canada in mid August,
8 do you recall that, with myself and you?

9 A. Yes. Yes, I do.

10 Q. And Mr. Roberts at one point was at the meeting; is
11 that correct?

12 A. That's correct.

13 Q. And Mr. Rosenau was there at the same time?

14 A. That's right.

15 Q. And do you recall me cautioning everyone that there
16 should be no contact with Mr. Whelpley?

17 A. Yes, in particular that Mr. Roberts should not
18 contact him alone. And I gave the same instruction to him.

19 Q. And how would you characterize the way that I
20 relayed that instruction to Mr. Roberts?

21 A. No uncertain terms.

22 Q. And was Mr. Rosenau there when I said that?

23 A. Yes.

24 Q. And was there any resistance by Mr. Roberts to what
25 I was telling him or anything that you heard? Did you hear

October 28, 2011

Page 43

1 Mr. Rosenau say anything about that?

2 A. That's kind of a double question. Mr. Roberts
3 wasn't upset. He acknowledged that we would be responsible,
4 that I would somehow take the step, and I think that was the
5 context in which I asked your earlier question. Should I
6 decide to serve this on Mr. Whelpley, would that be okay and
7 it would not jeopardize Mr. Rosenau's status, and you said
8 that's fine, you'd clear with Ms. Busic, and you eventually
9 gave me an email to that effect. When it comes to Mr.
10 Rosenau, I think he was just standing there at the time that
11 we had this dialogue with Mr. Roberts. It's a 3-way dialogue
12 rather than 4.

13 Q. Did you hear Mr. Rosenau say anything to Mr. Roberts
14 about whether or not he should serve that paperwork himself?

15 MS. ROE: Again, your Honor, I object. The
16 defendant is here and can testify. It's hearsay. I know
17 it's --

18 THE COURT: Go ahead if you (inaudible).

19 A. As I recall, Mr. Rosenau said, yeah, don't do
20 anything to breach me, for goodness sake, words to that
21 effect.

22 Q. All right. Is it a crime in British Columbia to
23 serve a person named in a lawsuit with valid pleadings
24 pursuant to that lawsuit?

25 A. Of course not. It's normal process.

October 28, 2011

Page 44

1 THE COURT: That was a rhetorical question.

2 Q. Although you're not involved in that separate
3 lawsuit with the order relating to travel, are you aware of
4 whether or not that's a real lawsuit?

5 A. Yes, a real lawsuit. It's real. A real looker
6 springs out of it.

7 Q. And is that a real order? I mean that's not a
8 forgery or anything?

9 A. No, it's a valid order, certainly looks it to me in
10 every respect.

11 MR. PLATT: Nothing further. Thank you, Mr.
12 Botting.

13 THE COURT: Ms. Roe, any questions?

14 MS. ROE: Yes, thank you, your Honor.

15 C R O S S - E X A M I N A T I O N

16 BY MS. ROE:

17 Q. Mr. Botting, I talked to you on the phone yesterday;
18 is that right?

19 A. That's correct.

20 Q. Okay. And you were I think driving because you
21 were -- I called your cell phone, and you pulled over and
22 chatted with me for a few minutes?

23 A. That's correct. I did pull over.

24 Q. Thank you very much for doing that. At that time
25 you said that Paddy Roberts was your paralegal, right?

October 28, 2011

Page 45

1 A. Yes.

2 Q. And that what he did was you said acting somewhat
3 beyond what I asked him to do.

4 A. Yes.

5 Q. And that is you asked him to have it served by the
6 sheriff; is that right?

7 A. Yes.

8 Q. Okay. And then you indicated just now that you have
9 reviewed the order in the civil defamation case.

10 A. Yes.

11 Q. And it's a real order in your mind.

12 A. In my mind, yes.

13 Q. And you've reviewed the filings also?

14 A. I believe a long time ago, but not recently. I
15 should --

16 Q. Let me ask you --

17 A. Well, no, I have to clarify something because it's
18 not quite right. Mr. Roberts was not acting as my agent or as
19 my paralegal in terms of deciding to serve this. He phoned me
20 up, asking me how he should serve it. In other words, he
21 initiated that, and I said either by process server or
22 sheriff.

23 Q. And in fact, you told me that yesterday and said the
24 process server would cost \$300, sheriff \$100.

25 A. Yes.

October 28, 2011

Page 46

1 Q. So you discussed the service of this with him.

2 A. That's right.

3 Q. And he has been a paralegal in your office or
4 continues to be?

5 A. Not in my office. In the interior B.C.

6 Q. Okay. So paralegal for you in your law practice.

7 A. Right.

8 Q. So you received the paper and the order in the civil
9 defamation suit from Mr. Roberts.

10 A. Yes, that's right.

11 Q. Is Mr. Roberts here today?

12 A. No.

13 Q. Is he in the country?

14 A. No.

15 Q. Did he think of coming with you or did you ask him
16 to come with you?

17 A. I asked him to stand by so that you could
18 interrogate him or ask him questions or ask him questions on
19 his affidavit which he had signed earlier on that I had seen.

20 Q. And do you know why he didn't come to the United
21 States? Could it be because he has a warrant outstanding for
22 drug importation?

23 A. I have no idea whatsoever about anything to do with
24 that.

25 Q. You know Mr. Roberts faced those charges in Canada

October 28, 2011

Page 47

1 at the same time the U.S. was trying to extradite him on
2 those?

3 A. I have no knowledge of that whatsoever.

4 Q. Have you ever looked at his blog?

5 A. I beg your pardon.

6 Q. Have you ever looked at Paddy Roberts' blog?

7 A. I think I did at one point, very -- well, not his
8 blog so much as his web site, whatever it is that he has.

9 Q. And his stories in the newspaper that he writes,
10 like cannabis and the magazine?

11 A. I've looked at a couple.

12 Q. And he really feels that extradition to the United
13 States is a violation of sovereignty, doesn't he?

14 A. You could put it that way, especially when you can
15 prosecute in Canada and it's not extradition. It's certain
16 times of extradition such as this one where actions take place
17 in Canada and in the United States, and Canada never -- it
18 always turns a blind eye and refuses to prosecute in Canada,
19 and it seems ridiculous that people should be sent out of
20 their homeland and into a -- well, a city like Seattle or in
21 California or all over the states.

22 Q. And you feel that way --

23 A. And typically what happens is that Canada will not
24 prosecute its own people, and that is Mr. Roberts' main
25 concern.

October 28, 2011

Page 48

1 Q. And you're in agreement or sympathetic to that,
2 aren't you?

3 A. I wouldn't say -- am I sympathetic? Yeah, I'm
4 sympathetic. Am I in agreement? Well, I think extradition
5 process is extradition process. I write books on extradition,
6 and basically of course I take an objective stand on that, but
7 increasingly I think this is disappointing that Canada does
8 not take its responsibility properly in my view.

9 Q. And that it turns over its citizens in to the United
10 States --

11 A. The United States, yeah.

12 Q. Mr. Botting, did you -- have you ever been up to Mr.
13 Rosenau's home in Quesnel?

14 A. No.

15 Q. Why? Is it far?

16 A. Yes.

17 Q. How many hours?

18 A. Four or 5. No, it's more than that because --

19 Q. 8 hours?

20 A. Probably 6 hours, yeah.

21 Q. You were his attorney on the extradition, is that
22 correct, just the appeal?

23 A. Yes, to the Supreme Court of Canada only.

24 Q. And your representation began in November of 2010?

25 A. That's correct.

October 28, 2011

Page 49

1 Q. And then the appeal was denied when?

2 A. It wasn't denied. It was -- the leave to appeal was
3 not granted.

4 Q. Okay. So not accepted. It was like cert denied.

5 A. Yes, and of course that happens to almost all but
6 200 cases a year out of 3000.

7 Q. By far the majority, isn't that right?

8 A. Right.

9 Q. So when was that done?

10 A. Oh dear.

11 Q. In April?

12 A. I can't recall the exact time.

13 Q. And at that time you had completed or exhausted all
14 remedies on the extradition in Canada; is that correct?

15 A. That's correct.

16 Q. And was your representation of him done?

17 A. Technically, yes.

18 Q. I'd like to hand what's been marked exhibit 4. Mr.
19 Botting, is that a letter that Mr. Platt asked you about, you
20 referenced in your direct testimony?

21 (Exhibit 4 marked.)

22 A. Yes, that's correct.

23 Q. And that's the one that you sent to Mr. Moffat, a
24 lawyer Kip Whelpley contacted in March or February of 2011?

25 A. That's right, and this says I represent Mr. Rosenau

October 28, 2011

Page 50

1 strictly for his appeal of committal for extradition.

2 Q. Right. Okay. And at that time you indicated your
3 familiarity with this civil lawsuit or civil, you know,
4 whatever it is, lawsuit that Paddy Roberts, using his Gaelic
5 name, had brought against Mr. Whelpley; is that right?

6 A. If you can point that out to me in here?

7 Q. You have had nothing to do but to give advice -- you
8 understand about it. The emails in the second paragraph were
9 between the two people, your name has been used, but you sort
10 of separate yourself from that lawsuit.

11 A. Yes, okay.

12 MS. ROE: I offer exhibit 4.

13 THE COURT: Mr. Platt?

14 MR. PLATT: No objection.

15 THE COURT: All right. Number 4 is admitted.

16 (Exhibit 4 admitted.)

17 MS. ROE: Nothing further then, your Honor.

18 THE COURT: Mr. Platt?

19 R E D I R E C T E X A M I N A T I O N

20 BY MR. PLATT:

21 Q. By the way, is it Mr. Botting or Dr. Botting?

22 A. I go by both, but doctor, yeah, is fine.

23 Q. Is it a crime -- well, let me ask you this. Have
24 you had an opportunity to review the email that was sent
25 within the last couple weeks allegedly by Paddy Roberts to Mr.

October 28, 2011

Page 51

1 Whelpley?

2 A. I read it. I do recall it.

3 Q. In your opinion is that email -- does that
4 constitute a criminal act?

5 A. No.

6 Q. Okay. Not under the laws of British Columbia; is
7 that correct?

8 A. No, I think he's warning Mr. Whelpley that if he
9 comes down to the United States, he would be in contempt of
10 court. That's by context, and indeed, he would be.

11 Q. Now, Ms. Roe asked you about whether or not you
12 separate yourself from Mr. Roberts, and I want to ask you
13 about why. Is one of the reasons you separate yourself from
14 Mr. Roberts because he's a bit of a loose cannon?

15 A. Yeah. You have to be very much -- be very specific
16 and direct with him, and now apparently even if you are
17 specific and direct as you and I have both been, he still acts
18 on his own initiative sometimes, especially in this particular
19 case it almost becomes a project. He initiated the civil suit
20 in the first place, and he may have had the nod at the
21 beginning, but, you know, I chose not to serve this document,
22 and when finally he said, okay, now's the time to serve it, we
23 got to serve it, we got to serve it, we got to serve it, I
24 said, well, make sure you do it in a legal way then, either
25 through a sheriff or process server, and the email came as a

October 28, 2011

Page 52

1 complete surprise, but it's not illegal, no.

2 Q. Would you characterize his interests in this area as
3 borderline if not totally obsessive?

4 A. Obsessive is pretty close.

5 Q. And it's true and you've been asked about this and
6 testified that your dealings with Paddy, it's very obvious
7 that he feels very strongly about these issues of extradition;
8 is that right?

9 A. Yes, he feels very strongly, to the point that --
10 you know, he doesn't trust lawyers. I don't think he trusts
11 you and I. I don't think he trusts me either, but sometimes
12 he thinks that we are much too conservative, you know, that we
13 don't act quickly enough and he's drafted affidavits that are
14 frankly inflammatory. As I say, he's a loose cannon, and it's
15 very hard to control somebody like that..

16 Q. And have you seen an affidavit that he prepared for
17 this hearing where he talks about how he did this on his own
18 without Mr. Rosenau's sworn affidavit?

19 A. Yes, I have.

20 Q. So is it fair that it's somewhat of a personal issue
21 for him, this whole question of extradition, that he takes it
22 personally?

23 A. Yes. Initially he attempted to have Mr. Rosenau
24 charged in Canada so that any details, you know, that might
25 come out of this, like out of the extradition hearing would in

October 28, 2011

Page 53

1 fact be dealt with in a Canadian court rather than in an
2 American court and thereby avoiding extradition altogether,
3 and that of course the expectation was that the Canadian court
4 would simply throw it out because there was no -- there was
5 not enough evidence whatsoever. So, you know, that's how he
6 was fighting off the extradition.

7 He did the same thing with Mark Emery (phonetic),
8 just trying to charge him domestically so that the Canadian
9 courts could meet their responsibility. But this is a
10 political ploy on his part. It's strictly a political gambit
11 where he tries to involve himself in other people's business,
12 shall we say, and in this case that's how he I think became
13 involved.

14 Q. And he considers himself or he is the leader of a
15 political party whose stated purpose, one of them, is to
16 secede from the rest of Canada; is that correct?

17 A. That's correct.

18 Q. So does it surprise you that he would go off and act
19 independently even after we've instructed him not to do so?

20 A. Well, it doesn't surprise me. You want to tap into
21 that kind of enthusiasm I suppose at one level, but there are
22 downsides to that in this case. We wouldn't know here if it
23 wasn't for his acting precipitously to try to get this -- Mr.
24 Whelpley served with the results of his litigation.

25 Q. Now, you were asked about your feelings regarding

October 28, 2011

Page 54

1 the extradition process by Ms. Roe, and I'd like to follow up
2 on that. Is it fair to say that to the extent you have a
3 problem with extradition that you have a problem with the way
4 the extradition was handled in Mr. Rosenau's case.

5 A. Yes.

6 Q. What is it?

7 A. Well, first of all, the record of the case seems to
8 be something --

9 MS. ROE: (Inaudible) with the underlying
10 (inaudible).

11 THE COURT: I'm going to sustain that objection
12 only because we're not going to relitigate the litigation in
13 Canada at this point in this court.

14 MR. PLATT: No further questions. Thank you.

15 THE COURT: All right. Ms. Roe.

16 MS. ROE: Your Honor, I have a point of inquiry.
17 Mr. Platt mentioned an affidavit from Mr. Roberts, and I
18 haven't seen that. Relating that, may I ask --

19 MR. PLATT: We're not offering it, your Honor.

20 MS. ROE: Then I have no further questions.

21 THE COURT: All right. May Mr. Botting step down?

22 MR. PLATT: Yes.

23 THE COURT: And can he be excused if he wants to
24 go?

25 MR. PLATT: Yes, your Honor.

October 28, 2011

Page 55

1 THE COURT: All right. Thank you very much, Mr.
2 Botting. And Mr. Platt, additional witnesses?

3 (Witness excused.)

4 MR. PLATT: Your Honor, I have a point of order to
5 inquire.

6 THE COURT: Sure.

7 MR. PLATT: I've never been in this situation
8 before, but if possible, and I normally never ask constructure
9 (phonetic) from the court, but we've debated whether or not we
10 wanted to put Mr. Rosenau on the stand for the very limited
11 purpose of responding to whether or not he directed Mr.
12 Roberts in any way to have this contact. That seems to be the
13 gist of the entire violation. But we would not want him to be
14 in any way considered to be waiving his fifth or sixth
15 amendment right, that he would not be cross-examined on
16 anything to do with the underlying offense, and that we would
17 strictly limit the inquiry to the specific issue of whether or
18 not he instructed Mr. Roberts or authorized or approved this,
19 comparable to a 3.5 hearing.

20 THE COURT: Ms. Roe, what's your I guess position?

21 MS. ROE: Your Honor, I think the appropriate
22 testimony if it's to be so limited would be coming from Mr.
23 Roberts as to his instructions. I think it would be -- since
24 the scope of this hearing has been so broad that should Mr.
25 Rosenau take the stand, it should be equally broad regarding

October 28, 2011

Page 56

1 the lawsuit, the civil suit, what was expected, really bigger
2 than just a very limited question of whether he got --

3 THE COURT: All right. Mr. Platt?

4 MR. PLATT: I have no response. I would just --

5 THE COURT: Well, I understood your first request
6 as a request to limit the examination as to matters relevant
7 to this hearing, although maybe your idea of the scope of that
8 limitation may be different than the scope as understood by
9 Ms. Roe, and I think what Ms. Roe is saying is that what's
10 before her or what's before the court has this whole issue
11 about what is your client's involvement in this lawsuit, and
12 it's not limited to a few questions about what he specifically
13 said on a certain day to Paddy Roberts or not. So I don't
14 know if that is putting words in Ms. Roe's mouth, but I think
15 I suppose that -- I can't give you an advisory opinion or
16 ruling sort of in the abstract here because as you probably
17 could surmise, I suppose the questions rise and fall on how
18 relevant they are to the question before the court.

19 You know, we're not going to allow a situation where
20 Ms. Roe is going to say, well, let's talk about the charges
21 and helicopters or things like that. Perhaps that would be
22 reserved for trial if your client wanted to testify then, but
23 of course I would have to make relevance determinations as to
24 any question posed in cross-examination as it relates to the
25 issue before me. So that's about all I can say.

October 28, 2011

Page 57

1 MR. PLATT: That's extremely useful, your Honor.

2 THE COURT: And I say this, Mr. Rosenau, because
3 you do have a right, as your lawyer is probably indicating, to
4 testify if you want. You have the right not to testify. It's
5 your decision to make between yourself and your lawyer. All
6 right? And so Mr. --

7 MR. ROSENAU: I think I understand.

8 THE COURT: So Mr. Platt, it's up to you how you
9 want to proceed at this moment.

10 MR. PLATT: May I have just one moment, your Honor?

11 THE COURT: Sure.

12 MR. PLATT: Your Honor, this is a very difficult
13 decision, but we have no further witnesses at this time.

14 THE COURT: All right. All right. So I guess I
15 should hear closing remarks. Ms. Roe, why don't you start
16 off, and then we'll hear from the defense.

17 MS. ROE: Your Honor, this is really an interesting
18 question of whether the court's going to enforce the
19 conditions of a release for a defendant who really seems to be
20 unsupervisable at this point. He lives far from the border.
21 Ms. Busic has done a good job and tried to keep in touch, but
22 clearly there have been games being played for the lasts few
23 months.

24 The defendant has a presumption of being detained,
25 and at this point now the government's position is that he,

October 28, 2011

Page 58

1 through his friend Paddy Roberts, a drug -- a pilot who has
2 been charged with delivering marijuana into the United States
3 also, has acted on behalf of Mr. Rosenau and with Mr.
4 Rosenau's permission.

5 What's interesting about exhibit 4, the letter that
6 Mr. Botting authored, is the last paragraph in which he says,
7 you know, Mr. Rosenau gives instructions and we follow them,
8 and I think it's pretty clear that that's what's happening.
9 Mr. Rosenau is no fool. He had someone else do it. Probably
10 wisely or perhaps wisely, Mr. Botting wasn't going to do it,
11 but he had his friend Paddy Roberts do it under his Gaelic
12 name.

13 Most importantly, too, is that this had nothing to
14 do with an extradition order. This is pure and simple trying
15 to stop a against Mr. Rosenau from testifying and being
16 available in court, and the history of this lawsuit, this
17 notice and defamation suit and this default order is what's
18 amazing here and what's important because it's all done to
19 stop the trial from going forward.

20 No one in this courtroom knows the validity of that
21 Canadian order, so the government cannot ask Mr. Whelpley to
22 ignore it, and we cannot hold him harmless for doing that. It
23 may be a valid order, at least it seems to be at this time.
24 This is an attempt by Mr. Rosenau to thwart the witnesses
25 against him. As such it is a violation of his supervised

October 28, 2011

Page 59

1 release. He is presumed to have been detained and we ask that
2 he be detained now as he has not conformed and is unable --
3 and the court is unable to assure that he is conforming with
4 the terms of his supervision.

5 THE COURT: All right. And Mr. Platt.

6 MR. PLATT: Thank you, your Honor. I know this
7 hearing has gone long, your Honor, but the reason is it's --

8 THE COURT: No rush. No rush. Go ahead.

9 MR. PLATT: Thank you. Just responding to the point
10 about the term instructions. I worked in London for a while
11 with a solicitor firm, and instruction means whether or not
12 you're retained. That's really what that means.

13 And in that letter what Mr. Botting is saying over
14 and over again is I'm not involved in this. How can I respond
15 if I haven't been instructed. If I'm instructed, I'll
16 respond, and the implication is he wasn't instructed. So to
17 flip that on the other side and say somehow that shows he was
18 instructed is patently absurd.

19 With respect to the violation here, the standard
20 that the court should apply is clear, cogent, and convincing
21 evidence. Obviously the burden here is on the government.
22 Our position is that the evidence at this hearing is far from
23 clear, cogent, or convincing in terms of what happened about
24 this contact by Mr. Roberts with Mr. Whelpley, and there is
25 basically no evidence that Mr. Rosenau in any way authorized,

October 28, 2011

Page 60

1 requested, approved, or facilitated any action by Mr. Roberts.
2 with respect to to Mr. Whelpley.

3 In fact, the only evidence offered in that regard is
4 to the contrary, that Mr. Roberts goes off on his own, he does
5 things on his own, he's hard to control, he was repeatedly
6 told not to have contact and did anyway, that he was told at a
7 meeting where Mr. Rosenau was participating not to have
8 contact with Whelpley, and that he did so anyway. There's no
9 evidence to the contrary. There is zero evidence linking Mr.
10 Rosenau with what occurred here whatsoever, none. So Mr.
11 Rosenau did not authorize the email sent by Paddy Roberts, and
12 he denies any involvement in that.

13 Number two, in addition, all emails other than this
14 email in the last couple weeks were dated prior to the
15 imposition of pretrial release conditions in this case.
16 Therefore, it is essentially impossible for those to be
17 considered violations. That would be an ex post facto
18 application of the conditions of release in this case, back in
19 time. You can't impose conditions and then violate someone
20 because before those conditions were imposed there's an
21 allegation of violation.

22 But we don't even agree it is a violation. Service
23 of process of legitimate legal pleadings which, let's face it,
24 includes notifying someone about the service, that's
25 legitimate. You can call somebody up and say I got to serve

October 28, 2011

Page 61

1 you with legal papers. It happens every single day.

2 There's also an implication here which we didn't get
3 too far into, but something about the lawsuit in Canada is
4 vexatious. Well, I think every lawsuit is vexatious to the
5 person involved. That doesn't mean it's illegal or it's
6 invalid or it's not proper. There's nothing improper
7 whatsoever about the lawsuit that was prepared here, and
8 there's an implication that somehow that constitutes some kind
9 of interference with the witness.

10 And above all, the question of service of process
11 was brought to the attention of the person who is in charge of
12 reviewing whether or not the conditions are being followed,
13 and that's Julie Busic. Early on in the case, a few weeks
14 after I was appointed, we contacted Ms. Busic, we taulked
15 about it. I told her there was a lawsuit. She read her
16 notes, she said that. And she said that she didn't have a
17 witness list, but we assumed for the purpose of that
18 conversation that this would be a witness. We couldn't have
19 been any more above board. We weren't hiding the ball at all.

20 So filing the lawsuit is not a violation, and I
21 think there's an analogy here that is very relevant, and that
22 would be in the context of a dissolution. It is quite common
23 for -- and unfortunate, but quite common that you would have a
24 husband who hits his wife and she wants a divorce. The
25 husband winds up charged in criminal court, and there's also a

October 28, 2011

Page 62

1 divorce suit pending. The husband no doubt will have a no
2 contact condition imposed, domestic violence no contact order
3 of some kind. He retains counsel. The attorney for the
4 husband may represent him in both the dissolution and the
5 criminal matter. If he represents them in the dissolution,
6 it's quite likely that he would file the dissolution petition,
7 and if there are temporary orders, especially if it involves
8 children and so on, there could be affidavits filed by the
9 husband denying and disputing the subject matter of the
10 criminal case. This is not a violation of the no contact
11 order.

12 Here we have a lawsuit disputing the allegations
13 made by Mr. Whelpley essentially saying that he's lying and
14 he's defaming Mr. Rosenau, and to serve him with such
15 paperwork or to make arrangements for that service could not
16 possibly be a violation of a no contact condition. In fact,
17 I'm not sure, but I recall there was somewhat of a colloquy by
18 the court in the very first hearing where Mr. Rosenau was
19 released talking about you've got Mr. Platt as your attorney,
20 let him deal with all these things, and you admonished Mr.
21 Rosenau not to have any contact, and by implication verified
22 that it would be acceptable if I did have contact, and that's
23 all this amounts to.

24 So we're saying, you know, it's arguable there's not
25 a violation here at all, even by Mr. Roberts, even if he were

October 28, 2011

Page 63

1 acting with authority, which he was not.

2 So Mr. Roberts acted totally alone. He was told by
3 everyone not to be involved in this, and Mr. Rosenau
4 specifically told him he didn't want to be breached on his
5 pretrial release conditions because of Mr. Roberts' behavior.
6 Personally I never knew anything about any of these emails
7 until they were provided to me a couple days ago. I did know
8 about the lawsuit obviously. But Mr. Roberts -- we're not
9 offering the affidavit because he cannot stay on task. He did
10 supply an affidavit that was absurd, lengthy. We're not
11 wasting the court's time with it, but in that he does say as
12 Mr. Botting indicated that he acted alone without any --

13 MS. ROE: Objection as to something that's not
14 before the court (inaudible).

15 MR. PLATT: Well, it was testified to. So the other
16 argument the government may wish to make is that somehow this
17 lawsuit is illegal. That's why I asked those questions. This
18 is a legal order, it's been properly filed. Mr. Botting
19 talked about that. It was issued by a judge in Canada. If
20 that's a crime, then the judge who issued the order is part of
21 the crime. It's a legitimate legal process. It was approved
22 in advantages by Ms. Busic, and I also asked Mr. Botting, who
23 is an attorney in British Columbia whether or not the emails
24 sent by Mr. Roberts constitutes a crime, and the answer was
25 no. Ms. Roe herself has indicated that we don't know British

October 28, 2011

Page 64

1 Columbia law, so they can't show here that any crime occurred.
2 It has to be a violation of conditions, and they have to show
3 that by clear, cogent, and convincing evidence, which they
4 haven't done.

5 There are some things that weren't brought up in
6 testimony, but they're in the brief filed by Ms. Roe, and I
7 think they should be addressed.

8 There is an implication here of some impropriety
9 with the way we characterize the issue in our response to the
10 government's motion for authorization of deposition, which I
11 take strong issue with. The implication there is that somehow
12 we were hiding the ball on the fact that there was this
13 lawsuit in British Columbia. We obviously weren't. I told
14 Ms. Busic about it early on.

15 Not only that, if you read the conclusion in that
16 document, it's document number 28, in the conclusion we say
17 the government has not met their burden. Instead Ms. Roe
18 inserts a footnote in her brief where she quotes us as saying
19 that there is no issue here. Now, that's a bit of a side
20 issue, but it's there, and I think it needs to be addressed.

21 Our conclusion is very clear. The government had
22 the burden of showing that there were some substantial basis
23 for the request for a foreign deposition. They didn't do it,
24 and the court ruled that in fact they would not be allowed to
25 have this deposition.

October 28, 2011

Page 65

1 As far as whether or not we knew anything about
2 whether or not the lawsuit would prevent someone from coming
3 to the United States, I don't think anyone in this courtroom
4 is clear on that. That involves law in Canada, and I don't
5 think any of us totally understand it. Mr. Erickson agreed
6 with that.

7 One thing that is interesting about the deposition,
8 though, is apparently the government was requesting a
9 deposition of a witness where there was a lawsuit supposedly
10 preventing him from leaving Canada, and yet nowhere is there
11 any discussion whatsoever of that lawsuit, and yet it's the
12 only witness the government has asked to depose in this case.
13 So that means they set up a deposition apparently without
14 talking to the witness first or they would have found out
15 about this lawsuit.

16 There's also something that wasn't talked about
17 here, which is Mr. Steward (phonetic), Glen Steward, and him
18 being contacted by someone. It's completely unclear, it's far
19 from convincing. There's no indication whatsoever who talked
20 to Mr. Steward. I can assure the court as an officer of the
21 court, I'd be willing to make an offer of proof to this
22 regard. I talked to Mr. Steward, and our conversation was
23 about how I wanted him to testify and I wanted to make
24 arrangements to get him down here to testify at the trial.

25 So casting aspersions on the defense that we were

October 28, 2011

Page 66

1 somehow impeding Mr. Steward from coming down to testify, if
2 it was Paddy Roberts involved in that, that shows just how far
3 afield Mr. Roberts goes, that anybody telling Mr. Steward not
4 to come down here and testify would be going directly against
5 my strategy as the trial attorney for Mr. Rosenau. So we have
6 no idea what that's about.

7 And further, I can tell the the court Mr. Rosenau
8 was well aware that we wanted Mr. Steward to come down here
9 and testify, and discussions were had talking about getting
10 Mr. Steward down here to testify and what's the best way to
11 make the arrangements, what date would he be needed, that kind
12 of thing. So why anybody -- why Henry would have anything to
13 do with telling Mr. Steward not to come testify is ludicrous.

14 Your Honor, I said this last time and I'll say it
15 again. The issue here is whether or not Mr. Rosenau is going
16 to appear for court and whether or not he's going to interfere
17 with witnesses. The government has offered not one scintilla
18 of evidence that he would interfere with the witness. They've
19 offered evidence that some other person who claims to be
20 acting as an agents of Mr. Rosenau had contact with Mr.
21 Whelpley, and yet they haven't even established that that
22 contact constituted a crime, and they have no evidence that
23 Mr. Rosenau was involved in that contact in any way, shape, or
24 form.

25 The only evidence offered is exactly the opposite,

October 28, 2011

Page 67

1 that he did not authorize, he did not approve. There's
2 evidence about the meeting we had where Mr. Rosenau told Mr.
3 Roberts not to have contact. There's zero evidence to the
4 contrary.

5 I'll close with what I closed with at the first
6 hearing, which is the presumption of innocence. There is an
7 implication here that this lawsuit is vexatious because it is
8 not well founded and it's not well founded because it can't be
9 true, and it can't be true because everyone knows Mr. Whelpley
10 is telling the truth, and anyone saying otherwise is somehow
11 doing an illegal act. That's like an irrebuttable presumption
12 of guilt. Our presumption is the presumption of innocence
13 applies here. Mr. Rosenau is presumed innocent. There is
14 absolutely no showing that he violated these conditions, and
15 there's no showing that this lawsuit in Canada constitutes any
16 violation of conditions, and it does not constitute a crime;
17 therefore, there is no basis for the government's position.
18 Thank you.

19 THE COURT: All right. Ms. Roe, any brief
20 rebuttal?

21 MS. ROE: No, your Honor.

22 THE COURT: All right. So, Mr. Rosenau, today is a
23 sad day because I will find that there is a violation of the
24 alleged condition. There is a violation of the condition of
25 supervision regarding the contact, and let me kind of, you

October 28, 2011

Page 68

1 know, set this straight because the arguments have kind of
2 ranged all over the place regarding the propriety of lawsuits,
3 and I think in some ways we're all kind of missing the point
4 here.

5 I'm not here to discuss the laws, extradition laws,
6 if they're good or bad. I'm not here to discuss whether
7 somebody can bring a civil lawsuit in Canada or not. We're
8 here to discuss whether or not there was indirect contact in
9 this case, and your lawyer says that there is no evidence or
10 not a scintilla of evidence in this case, but I think the
11 evidence in this case indicates that there is in fact a very
12 direct connection between you and the contact in this case.

13 Now, we do begin with Julie Busic, the probation
14 office pretrial service unit supervisor, going over the list
15 of witnesses. They're in plain English. Kip Whelpley is
16 there, and for you to tell her I don't recognize any of these
17 names is just frankly not really believable, especially since
18 Kip Whelpley was just sued this year and you're the named
19 plaintiff, and also because his name is in the discovery in
20 this case, and so it would not be a surprise to anyone to see
21 Kip Whelpley as a witness and it would not be very believable
22 for you to say I don't recognize this person at all.

23 I did admit the exhibits presented by the government
24 over the defense objection regarding their relevance, and I'm
25 not here to say that I am relying on them as your lawyer says

October 28, 2011

Page 69

1 in an ex post facto way saying that the violations occurred in
2 January or February or sometime before May, but I do think
3 that they paint a fuller picture of what's going on, and I do
4 think they are relevant in terms of at least your knowledge as
5 to who Kip Whelpley is in relationship to your case.

6 I think we want to separate the difference between
7 is the lawsuit proper, is the order proper, which I don't have
8 to decide, versus whether there was contact or indirect
9 contact, which I do have to decide. As your lawyer says, it
10 was okay for a lawyer actually representing you to in a lawful
11 way have contact with witnesses to do investigation as
12 appropriate. That's Mr. Platt's job, to go and investigate
13 the criminal side. That's Mr. Botting's job to investigate
14 and prepare the extradition side.

15 Well, Mr. Platt and Mr. Botting didn't act in this
16 case. Instead we have Mr. Roberts, Paddy Roberts, with the
17 argument essentially he's out of control, no one can control
18 him, so just don't blame Mr. Rosenau, but you really can't
19 have your cake and eat it. You can't have a benefit without
20 saying I take no responsibility, it's just a wild and crazy
21 guy doing this. You're the named plaintiff. You're the
22 beneficiary of an order. You're the beneficiary of a lawsuit
23 and an order that still as far as I know stands at this very
24 moment, an order that says you have to pay me money, me, Mr.
25 Rosenau, the defendant in this criminal case, because you're

October 28, 2011

Page 70

1 lying or you've given lies regarding a criminal case pending
2 in the United States, and not only that, you're prohibited
3 from even leaving the country and entering the United States,
4 and that's still a pending order.

5 Now, your lawyer suggesting that, well, maybe the
6 order has no effect because we don't know the effect of the
7 order, and maybe that's true, there is nobody that has
8 testified as to the effect, but that order still stands, and
9 there have been communications regarding this order.

10 And so I do think that putting aside the propriety
11 of filing lawsuits and obtaining orders, and I don't have any
12 problem with that, but we're not here to decide that, that
13 there is evidence in this case given all of the evidence
14 presented of indirect contact. And of course, you know,
15 although this is a wild man that everyone says we can't
16 control, this is your lawsuit. You are the beneficiary of the
17 lawsuit. You are the plaintiff. You're the party in that
18 lawsuit, and if all these things were no good, you would have
19 sent some kind of letter. You would have withdrawn the
20 lawsuit if you wanted to. You would have sent some letter
21 saying I do not authorize any of these things. You would have
22 contacted your lawyers, I do not not authorize any of these
23 things that Paddy Roberts is sending off, please ignore them.
24 That never happened. It's just all Paddy's fault. But
25 Paddy's not going to get the damages. He's not the plaintiff.

October 28, 2011

Page 71

1 Paddy doesn't have anything necessarily to benefit from Mr.
2 Kip Whelpley coming or not coming to your trial. That's your
3 case.

4 Regarding Mr. Steward, I do understand your lawyer's
5 point. I mean Mr. Steward is sort of a side issue, and I'm
6 not here to decide anything, and there's no allegation that
7 you had anything to do with Mr. Steward's purported issue of
8 coming to the United States. I don't have to decide that as a
9 violation. That's really not in front of me, just as I don't
10 have to decide whether or not the lawsuit in Canada is
11 vexatious or not. That is not the allegation, that a
12 vexatious lawsuit was brought in violation of a condition of
13 release. The only issue is was there or was there not
14 indirect contact, and I find that there was in this case.

15 Now, your lawyer, find I should say, says that,
16 well, there's no violation because a lawsuit in Canada is not
17 a law violation, but witness tampering or obstruction is, and
18 to the extent -- I suppose the simplest way to say it is to
19 the extent the best defense is to make all the witnesses go
20 away, I think that this is not sort of farfetched to say
21 somebody is tampering with the witnesses because nobody is
22 going to show up for the trial and the trial will go away.

23 So I think that while I'm not here to say that the
24 lawsuit in and of itself standing alone is a law violation
25 under the laws of Canada, I do think in relationship to this

October 28, 2011

Page 72

1 case not the lawsuit but the contact and the communications --
2 the communication, since it is an October allegation,
3 essentially is one of those situations where one could easily
4 say this witness is being pressured or tampered with, and by
5 the way, as you know, under the witness tampering federal law
6 where it has to do with a witness for proceeding in a federal
7 proceeding, in a federal criminal proceeding, the state of
8 mind is quite relevant. If it happens, it happens, and a
9 violation can occur.

10 So, Mr. Rosenau, I will find that the violation has
11 been proven in this case. The government has moved for
12 revocation in this case, which means a remand to custody. I
13 find that that is appropriate. I know that you have otherwise
14 been doing very well on supervision, but when it comes to an
15 allegation that's not a technical kind of thing like were you
16 around somebody smoking marijuana or did you forget to turn in
17 a monthly report or you forgot to call Ms. Busic on one day,
18 things that perhaps you get a second or third chance, when it
19 comes to witnesses in a case and untoward contact, I think
20 it's grounds for both revocation and remand to custody.

21 Now, this decision of course, as your lawyer will
22 tell you, is reviewable by your district judge, Judge Pechman,
23 and I believe under the rules if you have any kind of appeal
24 or attempt to review, I'm advising you now so that you'll know
25 that you need to do that within 14 days of today's date.

October 28, 2011

Page 73

1 Otherwise you might be time barred in doing that.

2 All right. Ms. Roe, anything further from the
3 government?

4 MS. ROE: No, thank you, your Honor.

5 THE COURT: Mr. Platt.

6 MR. PLATT: Nothing further. Thank you.

7 THE COURT: All right. So unfortunately, Mr.
8 Rosenau, you're being remanded to custody. You might want to
9 talk to Mr. Platt. If you have any valuables or cars to deal
10 with or whatever, to make arrangements right now. You should
11 remain in the courtroom. The marshall will come and escort
12 you to detention. All right. Anything further?

13 MS. ROE: No, your Honor.

14 THE COURT: We'll be in recess.

15 THE CLERK: All rise. Court is in recess.

16 (Proceedings terminated.)

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I do hereby certify that the foregoing videotape hearing was transcribed by me as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; and that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

The portions of this transcript marked "(inaudible)" were inaudible or indecipherable due to the speaker dropping their voice, simultaneous speech, or noise in the courtroom.

IN WITNESS WHEREOF, have hereunto set my hand and seal this _____ day of _____ 2011.

Karen L Larsen

Karen L. Larsen, RPR(Ret.)